distribution of salaries and negotiation of salaries by Anglo CBers.

On or about January 20, the Petitioner sent an e-mail to Elizabeth K. Julian, Southwest Secretary Representative, rebutting Ms. Johnson's, HUD Director of Human Resources, information; discloses a hostile working environment; and reminded her of being told that "people" were upset at him. On or about January 25, 1999, the Petitioner sent an e-mail dated to Ms. Julian disclosing his office situation and stressful working environment. On or about February 1, 1999, the Petitioner sent an e-mail to Mr. Perez asserting that Ms. Johnson's letter dated January 18, 1999 was biased and incorrect and disclosed his feeling of being depressed as a result of being accused of using political influence to obtain a transfer to San Antonio.

On or about February 10, 1999, the Petitioner was summoned to Ms. Leon's office for a third time within four (4) months and accused by Ms. Leon of not knowing of his whereabouts. On or about February 10, 1999, the Petitioner through an e-mail disclose that he felt he is being targeted, and questioned Ms Leon's intentions, asserted he always provided a schedule of his work activities in and out of the office, expressed fear of being terminated, and he felt he needed to protect himself and seek outside advice. On or about February 25, 1999, the Petitioner sent Mr. Perez an e-mail disclosing his concerns about the CBer Fellow Program, repercussions as a result of his advocacy efforts, and requested to convey this information to Saul Ramirez. The Petitioner never received any responses to his letters or e-mail communications from Mr. Ramirez, Ms. Johnson, Ms. Julian, or Mr. Perez regarding requested information or disclosures of harassment or office environment.

On or about March 9, 1999, the Petitioner presented Ms. Leon with a written summary of the issues he addressed during the meeting. In his written summary, the Petitioner disclosed that he was upset that no Hispanics were chosen for the San Antonio HUD office and area and addressed the low number of Hispanics hired in the second round of the selection of CBers. The Petitioner disclosed he would be addressing his concerns with the National Council of La Raza (Director, Raul Izaquirre who served on the CBer Program Advisory Committee), and to his Congressman Charlie Gonzales.

On or about March 12, 1999 Ms. Leon presented the Petitioner with a Memorandum of Counseling (MOC) accusing him of unprofessional conduct related to the three incidents of November 7, 1998, November 17, 1998 and February 10, 1999 and the improper use of the Defendant's e-mail system. The MOC threatened the Plaintiff with employment termination if he did not improve his conduct. On or about April 5, 1999, the Petitioner submitted a written response and rebuttal to the MOC dated April 5, 1999.

On or about March 12, 1999, Ms. Leon presented the Petitioner his performance evaluation, which was the lowest performance evaluation of all CBers and was not awarded a monetary work performance award. On or about March 23, 1999, the Petitioner submitted a rebuttal to the performance evaluation. Ms. Leon never responded to the Petitioner's rebuttal to the MOC and the performance evaluation.

On or about August 7, 1999, Ms. Leon and Ms. Julian held a meeting with the Petitioner at a local restaurant and presented him with an ultimatum that he would transfer to Fort Worth or be terminated. Ms. Julian informed the Petitioner that the Respondent needed an aggressive

Hispanic in the Fort Worth office. After questioning the salaries of the Anglo CBers who had left HUD's Fort Worth office, Ms. Julian presented the Petitioner with a cryptic email communication (could not be downloaded or printed so pictures were taken) dated August 18, 1999, informing him that the transfer to Fort Worth was not an offer but an assignment and advised the Petitioner to make a decision, that would be in his best interest.

On or about September 16, 1999, the Petitioner filed an internal grievance disclosing that he was leaving the CBer Program because of the discriminatory treatment and adverse actions taken against him. On or about October 8, 1999, Ms. Julian dismissed the Petitioner's grievance and informed him that the grievance was not subject to further review.

I. Review is Warranted to Determine Whether The Fifth Court of Appeals Applied Higher Standards for Petitioner to Prove His Claims.

In the Petitioner's case, the Appeals Court establishes that the question in this case is whether the District Court erred in granting summary judgment for the Respondent on the Petitioner's claim of hostile work environment and constructive discharge claims. The Appeals Court states that one of the issues used for consideration in making its decision regarding hostile work environment was the fact that the Petitioner alleges that he received a performance appraisal of "fully successful" while everyone else received a higher rating and that he received a memorandum of counseling admonishing him for unprofessional conduct, misuse of the e-mail system and his attitude towards Ms. Leon. The Appeals Court contended that the memorandum did not affect the Petitioner's compensation or benefits.

The Appeals court in analyzing the issues in the Petitioner's case cites *Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871, 873 (5th Cir. 1999) as their guide for the standard, used to establish the five elements of hostile work environment were: (1) the employee belonged to a protected class; 2) the employee was subjected to unwelcome sexual harassment; (3) harassment based on sex (4) the harassment affected a term, condition or privilege of employment; and the 5) employer knew or should have known of the harassment and failed to take prompt remedial action.

In *Faragher* and *Burlington*, the Supreme Court modified this test with respect to cases where the alleged harasser is a supervisor with immediate or higher authority over the harassed employee. *Watts v. Kroger Co.*, 170 F.3d 505, 509 (5th Cir. 1999). In such cases, the employee need only meet the first four elements of the test. Id. n3. Once a plaintiff makes this showing, the employer is subject to vicarious liability for the supervisor's actions. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

When the harassment has not culminated in a tangible employment action against the complaining employee, the employer may avail itself of the affirmative defense. This defense is comprised of two elements: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any available preventive or corrective opportunities. Id.; *Watts*, 170 F.3d at 509-10. The Petitioner argues that the Statement of Case, the evidence (statements, exhibits, and affidavits) on record, and his depositions established that (1) he is a member of a protected class; (2) was subjected to unwelcome harassment; (3) disclosed the harassment, hostile working environment

and his reasonable belief of discrimination of Hispanics to his supervisor and higher management; and (4) that higher management ignored his pleas for intervention and failed to take immediate remedies to address his supervisor's harassment.

An employer is liable for the discriminatory acts of an employee only if it knew or should have known of the employee's offensive conduct and failed to take steps to repudiate that conduct and eliminate the hostile environment. *Nash v. Electrospace Sys.*, Inc., 9 F.3d 401, 404 (5th Cir. 1993) (citing *Jones*, 793 S.W.2d at 720). In *Delores Farpella-Crosby v. Horizon Health Care*, the 5th Circuit noted that, the type and extent of notice necessary to impose liability on an employer under Title VII are the subject of some uncertainty. *Waltman v. International Paper Co.*, 875 F.2d 468, (5th Cir. 1989). In *Waltman*, the Court concluded that three separate complaints to higher management constituted sufficient notice. Documented evidence on record, establishes that the Petitioner presented Ms. Julian and Mr. Perez with more than six e-mail communications complaining of stress, his environment, and harassment. The Petitioner argues that the Respondent should not be allowed any affirmative defense.

In granting the Respondent's Motion for Summary Judgment, the District Court's decision determined: to prevail on a hostile work environment claim the Petitioner must prove that (1) he belonged to a protected group; (2) he was subjected to unwelcome harassment; (3) the harassment complained of was based on race, national origin, or protected activity; and (4) the harassment affected a term, condition, or privilege of employment. The District Court then provided, "that assuming the Petitioner has raised a fact issue on the first two elements of his prima facie claim, he

has not done so on the third and fourth elements." The District Court then provides, "accepting all of these events [Statement of Case] as true, none are related to his protected status."

The Petitioner argues that the District Court, as well as the Appeals Court, held him to a higher standard to prove his claims. The District Court first implies that "assuming the Petitioner has raised a fact issue on the first two elements and has not done so on the third and fourth elements and also assuming that all the events are true, none are related to his protected status." The Petitioner raises the question: What evidence or existing law or policy was used to determine (even if one assumes "all events are true") what the Petitioner's level of burden is to prove that he is Hispanic and that his complaints of the discriminatory hiring of Hispanics and unfair distribution of salaries to Hispanics are not related to any protected status.

The Appeals Court cites *Harris v. Forklift Systems, Inc.*, 510 U.S. at 17, 21, 23 (1993) and provides Harris states that Title VII is violated "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." In addition to the Plaintiff's subjective perception of the abusiveness of the environment, the environment must be such that a reasonable person would find it hostile or abusive. The Appeals Court states that in their opinion the harassment wasn't sufficiently severe or pervasive. The Petitioner questions the Appeals Court's suggestion that his perception of the hostile environment was not sufficiently "subjective" and that if presented with all the facts of his claim that a "reasonable person" would not have found it "hostile or abusive".

In *Antoinette Pfeil v. Intecom Telecommunications, et al.*, 90 F. Supp. 2d 742; 2000 U.S. Dist. LEXIS 363, establishes that the court's inquiry into a hostile environment claim is whether the alleged harasser's actions have undermined the victim's workplace competence, discouraged her from remaining on the job, or kept her from advancing in her career. *Harris*, 510 U.S. at 22; *Shepherd*, 168 F.3d at 874; Butler, 161 F.3d at 270. Title VII is intended only to prohibit and prevent conduct "that is so severe and pervasive that it destroys a protected class member's opportunity to succeed in the workplace." *Shepherd*, 168 F.3d at 874; *Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 194 (5th Cir. 1996), cert. denied, 519 U.S. 1055, 136 L. Ed. 2d 607, 117 S. Ct. 682 (1997). Title VII's overall goal of equality is not served if a claim can be maintained solely based on conduct that wounds or offends, but does not hinder an employee's performance. *Weller*, 84 F.3d at 194.

The Supreme Court in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367, 370-71, 126 L. Ed. 2d 295 (1993), made clear that psychological injury is not a prerequisite to bringing a Title VII hostile work environment claim. As the Court explained, a working environment can be so abusive as to violate Title VII, irrespective of whether the claimant suffers psychological injury. Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion,

or national origin offends Title VII's broad rule of workplace equality. *Harris*, 510 U.S. at 17, 22, 114 S. Ct. at 370-71.

The evidence on record, and Petitioner's own statement, establishes that he presented sufficient evidence that his "subjective perception" of his working environment was abusive. "Reasonable witnesses" and the EEOC AJ's affidavits and statements indicate the existence of a hostile environment. Ms. Leon's discriminatory treatment undermined his workplace competence, discouraged him from remaining on the job (constructive termination) and kept him from advancing in his career. His work environment was so severe and pervasive that it destroyed his opportunity to succeed in the workplace. *Harris*, 510 U.S. at 22; *Shepherd*, 168 F.3d at 874; *Butler*, 161 F.3d at 270, *Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 194 (5th Cir. 1996), cert. denied, 519 U.S. 1055, 136 L. Ed. 2d 607, 117 S. Ct. 682. The sequence of events: three consecutive false accusations of unprofessional conduct, the Memorandum of Counseling threatening termination, and the ultimatum that he would be transferred or he would be terminated, all occurred within an eight (8) week period were actions intended to have the Petitioner fail and/or force him to leave the CBer program.

Contrary to the opinion of the Appeals Court, the Petitioner has testified that as a result of the performance evaluation he was denied a monetary work performance award which other CBers received in excess of $1,500.00 or more. "The Court must determine whether an environment is sufficiently hostile or abusive by looking at all the circumstances, including the frequency of the conduct or utterances, whether they are physically threatening or humiliating or merely offensive, and whether it unreasonably interferes with an employee's work performance".

Faragher v. City of Boca Raton, 118 S. Ct. 2275, 141 L. Ed. 2d 662, 1998 U.S. LEXIS 4216, *25, 1998 WL 336332, *9 (1998). The evidence, including testimony from witnesses on record establishes that the sequence of incidents and their timing were intended to interfere with the Petitioner's work performance, hence, the work performance evaluation presented to him on March 12, 1999.

In order to establish a prima facie case of retaliation, a plaintiff must prove that (1) he or she engaged in activity protected by Title VII; (2) this exercise of protected rights was known to Respondent; (3) Respondent thereafter took adverse employment action against the Petitioner, or the Petitioner was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) there was a causal connection between the protected activity and the adverse employment action or harassment. *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792 (6th Cir. 2000) (emphasis omitted). *Schramm v. Slater*, 105 Fed. Appx. 34, 41, 2004 WL 1595195, [*43] at *6 n.5 (6th Cir. July 14, 2004). See also *Pflanz v. Cincinnati*, 149 Ohio App.3d 743, 764, 2002 Ohio 5492, 778 N.E.2d 1073, 1089 (2002). The opposition clause of 2000e-3(a) requires the employee to demonstrate that he or she had at least a "reasonable belief" that the practice he or she opposed was unlawful. *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981).

The EEOC has argued that the purpose of Title VII's anti-retaliation provision supports its definition. In enacting Section 2000e-3, Congress unmistakably intended to ensure that no person would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 543 (6th Cir. 1993).

In *Sheila White v. Burlington Northern & Santa Fe Railway Co.*, 364 F.3d 789; 2004 U.S. 5th Cir. App. LEXIS 7191, the court provided, "this court's definition has the benefit of applying equally to all Title VII discrimination claims, not only to retaliation claims. Having a different standard for different provisions of Title VII would be burdensome and unjustified by the text of the statute, which uses the same phrase "discriminate against" in each of its anti-discrimination provisions". See *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 791-92 (6th Cir. 2000) (applying rules of statutory construction to hold that "discriminate against" means the same thing each time it appears in Title VII); *Mattei v. Mattei*, 126 F.3D 794, 806 (6th Cir. 1997) (presuming that Congress intended the phrase "discriminate against" to have the same basic meaning each time it is used in a statute).

II. Review is Necessary to Determine Whether The Fifth Court Of Appeals Appropriately Evaluated Evidence in Affirming Summary Judgment in Accordance with Civil Rules of Federal Procedure No. 56.

The Petitioner argues that the Respondent never submitted sufficient evidence to prove that its explanations for its actions were non-discriminatory or to rebut the Petitioner's evidence, testimony, or issues regarding the OIG's audit, EEOC Powell's findings on the Memorandum of Counseling, the issue of salary, and the transfer. The Respondent never submitted any evidence to prove whether the unprofessional conduct accusations used in the Memorandum of Counseling and made against the Petitioner by third parties were factual or not. The Petitioner submitted a surmountable amount of evidence proving that the accusations of unprofessional conduct were false.

EEOC Judge Powell stated, "The issue of why you were hired at the GS-13 level while others were hired at the GS-14 or 15 levels, I didn't get a real satisfactory explanation as to exactly what the qualification process was. They clearly were using a standard, an OPM standard. And any time you're dealing with that, there is some judgment involved. And there is some subjectivity involved".

The Petitioner argues that his evidence raised "genuine issues of material facts", more specifically the "credibility" of the Respondent's evidence and testimony and asserts that the Appeals and District Courts erred in affirming and granting Summary Judgment and denied him his constitutional right to a trial by jury.

In *Glynda K. Robertson v. Plaquemines Parish School Board*, 2000 U.S. Dist. Lexis 18022, (E.D. La. Dec. 6, 2000) the Court cites that the standard of review for summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The Court further provides that a fact is "material" if its resolution in favor of one party might affect the outcome of the action under governing law. *Anderson*, 477 U.S. at 248; *Hamilton v. Segue Software Inc.*, 232 F.3d 473, 2000 U.S. App. LEXIS 29511,*4-5, 2000 WL 1658218, at *2 (5th Cir. 2000). "No genuine issue of material fact exists if a rational trier of fact could not find for the nonmoving party based on the evidence presented or, stated conversely, an issue is genuine only if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party." Id.; *National Ass'n of Gov't Employees v. City Pub. Serv. Bd.*,

40 F.3d 698, 712 (5th Cir. 1994). The Petitioner contends that if a "reasonable jury" would be presented with the Statement of Case, documented evidence, and depositions it would return a verdict in his favor.

In *Antoinette Pfeil v. Intecom Telecommunications, et al.*, 90 F. Supp. 2d 742; 2000 U.S. Dist. LEXIS 3639, the court provides, "The evidence as a whole cited by Defendant, if believed by a jury, could support Plaintiff's discharge; however, it is impossible for the court to determine the import of such evidence solely by reviewing written testimony and documents. Such evidence should be evaluated and weighed by a jury, which can judge the credibility and demeanor of the witnesses. The true meaning and import of the testimony can only be determined by a jury, and a jury should resolve conflicting interpretations of the evidence. A reasonable jury could interpret the evidence as a whole differently and conclude that retaliation rather than poor performance, or the pager incident, was the real reason that Pfeil was discharged. Employers seldom leave direct evidence of retaliation". See *Nowlin v Resolution Trust Corp.*, 33 F.3d 498, 508 (5th Cir. 1994). The court concludes that the circumstantial evidence presented by Pfeil and the inferences that could be reasonably drawn from that evidence are sufficient to raise a conflict in substantial evidence on the ultimate issue of retaliation because "reasonable and fair minded persons" could reach different conclusions on the issue of retaliation. See *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996) (en banc). "For this reason, summary judgment is not appropriate for Defendant on Plaintiff's retaliation claim". *Antoinette Pfeil v. Intecom Telecommunications*, et al., 90 F. Supp. 2d 742; 2000 U.S. Dist. LEXIS 3639.

The Petitioner argues that the Appeals Court and District Court improperly applied Federal Rule of Civil Procedure No. 56 by summarily granting the Respondent's Motion for Summary Judgment and thereby denying him his constitutional right to a trial by jury. Conclusively, the Petitioner has presented sufficient evidence to establish that there are "genuine issues of material facts" in dispute and a trial by " a reasonable minded jury" would be able to determine whether he was subjected to retaliation, harassment, hostile working environment, and constructive discharge.

III. Review is Necessary to Determine Whether The Fifth Court Of Appeals in Affirming Summary Judgment Denied the Petitioner his Rights to a Trial by Jury in accordance with the Civil Rights Act of 1991.

The Petitioner argues that his evidence raised "genuine issues of material facts", more specifically the "credibility" of the Respondent's evidence and testimony and asserts that the Appeals Court erred in affirming summary judgment and thus, denied him his constitutional right to a trial by jury. *U.S. Constitution Amendment VII; Section 102(c) of the Civil Rights Act of 1991.*

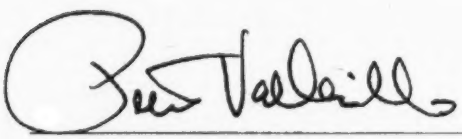
In enacting the Civil Rights Act of 1991, Congress for the first time, mandated that Plaintiffs bringing Title VII cases are entitled to a trial by a jury. *Section 102(c) of the Civil Rights Act of 1991.* What is occurring in Title VII cases is that a Congressional mandate is being abrogated by a rule recommended by a committee and approved by the court. The right to a jury trial guaranteed by the U.S. Constitution Amendment VII and extended to Title VII cases pursuant to *Section 102(c) of the Civil Rights Act of 1991* is being denied and usurped by a procedural rule through judicial subjectivity

and discretion without any accountability for its actions. The foregoing denial of jury trials in Title VII cases is pervasive throughout the federal judiciary.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectively submitted,



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APPENDIX

APPENDIX A-OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND DECIDED NOVEMBER 22, 2005

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 05-50238
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
November 22, 2005
Charles R. Fulbruge III
Clerk

Peter Vallecillo,

Plaintiff-Appellant,

versus

United States Department
of Housing & Urban Development,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Texas
USDC No. 5:03-CV-1120

Before SMITH, GARZA, AND PRADO, Circuit Judges.

PER CURIAM:*

The question presented in this case is whether the district court erred in granting summary judgment for Defendant-Appellee

United States Department of Housing & Urban Development ("HUD") on Plaintiff-Appellant Peter Vallecillo's hostile work environment and constructive discharge claims under 42 U.S.C. § 2000(e) et seq. ("Title VII"). Because we find that summary judgment was properly granted, we AFFIRM the district court's ruling.

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*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I. BACKGROUND

HUD hired Peter Vallecillo as a Community Builder ("CB") Fellow in September 1998. The CB program employed 400 professionals from an applicant pool of over 8,000 in order to provide out-reach services and foster community and economic development in approximately 81 HUD regions. After candidates were selected, HUD's Human Resources Department, pursuant to Office of Personnel Management guidelines, reviewed each

contender's prior experience and recommended a salary grade level of either GS-13, GS-14, or GS-15.

HUD offered Vallecillo a CB fellowship position, which he accepted, starting at the GS-13 level. Beginning early in his tenure, and continuing throughout the duration of his employment, Plaintiff-Appellant complained that Hispanics were under-represented in the CB program and that they were paid less than Caucasian and African-American employees. Vallecillo argues that after he questioned HUD's employment practices, he experienced problems with his own employment with the department.

On two occasions, in November 1998, two supervisors in the San Antonio office complained to Cynthia Leon, Vallecillo's immediate supervisor, that Plaintiff-Appellant had behaved inappropriately and had been verbally abusive during meetings. In February 1999, Leon accused Vallecillo of unprofessional conduct associated with his office hours. In March 1999, Plaintiff-Appellant received a performance appraisal of "fully successful," a rating that was lower than the rest of his co-workers.

Additionally, in March 1999, Vallecillo received a "memorandum of counseling" admonishing him for several incidents of unprofessional conduct including verbal confrontations with supervisors, his alleged misuse of the email system, and his attitude towards Leon. The memorandum did not affect Plaintiff-Appellant's compensation or benefits. Vallecillo also contends that, on one occasion, one of his supervisors referred to him as Che Guevara, and that in a small meeting, another supervisor referred to him as an "aggressive Hispanic" while commenting on the need for him to transfer to the Ft. Worth branch of the CB program. Plaintiff-Appellant alleges that he was also sent an email notifying him that he would be transferred to the Ft. Worth territory. Vallecillo resigned from the CB program on October 29, 1999.

II. PROCEDURAL HISTORY

Vallecillo filed a claim with the EEOC alleging hostile work environment based on his national origin and constructive discharge in violation of Title VII. On August 8, 2003, the EEOC issued its decision affirming the administrative judge's

determination that there was insufficient evidence to support Appellant's claims. Vallecillo, arguing the same claims, then filed suit against HUD in the United States District Court for the Western District of Texas on November 10, 2003, and Defendant-Appellee filed a motion for summary judgment on November 12, 2004. On January 27, 2005, the district court granted HUD's Motion for Summary Judgment, holding that Vallecillo failed to establish issues of fact (1) on whether the complained of harassment was on the basis of race, nationality or a protected activity; and (2) that the harassment was sufficiently severe or pervasive. Additionally, because the court found that Plaintiff's hostile work environment claim failed, it summarily denied Vallecillo's constructive discharge claim. Vallecillo timely filed his Notice of Appeal on February 3, 2005, claiming that the district court erred in granting HUD's Motion for Summary Judgment on Plaintiff-Appellant's hostile work environment and constructive discharge claims. We will consider each claim in turn.1

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1 Defendant-Appellee argues that Vallecillo has abandoned any challenge to the order granting summary judgment by failing to specifically address the district court's rationale. *See, e.g., McKethan v. Texas Farm Bureau*, 996 F.2d 734, 739 n.9 (5th Cir. 1993) (failure to sufficiently brief an issue constitutes waiver of the issue); *Cousin v. Trans Union Corp.*, 246 F.3d 359, 373 n.22 (5th Cir. 2001) (quoting *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994)) ("Normally, '[a]n appellant abandons all issues not raised and argued in its initial brief on appeal.'"). Pursuant to Rule 28 of the Federal Rules of Appellate Procedure, "[t]he argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on." FED. R. APP. P. 28(a) (5). While Vallecillo does not specifically address the enumerated reasons the district court gave

III. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

We review a district court's grant of summary judgment *de novo*, applying the same standard as the district court. *Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871, 873 (5th Cir. 1999).

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477

U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). When making its determination, the

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for granting Defendant-Appellee's motion, we determine that through his broad objections to the court's findings regarding his hostile work environment and constructive discharge claims, he argues with enough specificity for us to consider all of his arguments. Moreover, we should note that this is unlike the more execrable situation where an appellant either raises a completely new issue in its brief, disadvantaging the appellee, and for which the procedural bar concerning initial briefs was developed. It is also unlike the situation in *Cinel*, where the insurance company raised an issue with this Court that had no statutory support, thus,leaving us with no legal basis on which we could decide the issue.

court must draw all justifiable inferences in favor of the nonmoving party. *Anderson*, 477 U.S. at 255; *Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986); *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 956 (5th Cir. 1993).

To defeat a properly supported motion for summary judgment, the non-movant must present more than a mere scintilla of evidence. *Anderson*, 477 U.S. at 251. Rather, a factual dispute precludes a grant of summary judgment if the evidence would

permit a reasonable jury to return a verdict for the nonmoving party. *See Merritt-Campbell, Inc. v. RxP Prods., Inc.*, 164 F.3d 957, 961 (5th Cir. 1999).

IV. DISCUSSION

1. Hostile Work Environment

Title VII is violated "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-67 (1986)) (internal citations omitted). To prevail on a hostile work environment claim, Vallecillo must prove that: 1) he belongs to a protected group; 2) he was subjected to unwelcome harassment; 3) the harassment complained of was based on his race or national origin; and 4) the harassment affected a term, condition, or privilege of employment. *Frank v. Xerox Corp.*, 347 F.3d 130, 138 (5th Cir. 2003).

In addition to the Plaintiff's subjective perception of the abusiveness of the environment, the environment must be such that a reasonable person would find it hostile or abusive. *Harris*, 510 U.S. at 21-22; *Frank*, 347 F.3d at 138. Whether an environment is hostile or abusive can be determined only by looking at the circumstances, including, *inter alia*, the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with the employee's work performance. *Harris*, 510 U.S. at 23.

Most importantly, as the Supreme Court pointed out in *Meritor* and re-articulated in *Harris*, the "'mere utterance of an . . . epithet which engenders offensive feelings in an employee' does not sufficiently affect the conditions of employment to implicate Title VII." *Id.* at 21. "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1988) (internal quotation marks omitted).

We agree with the district court that even if the Plaintiff-Appellant demonstrates that he belongs to a protected class and that he was subjected to unwelcome harassment, he has not raised an issue of fact that the complained-of harassment was based on his race or national origin or that the harassment affected a term, condition, or privilege of employment. Accepting all of the incidents that Vallecillo lists as true, none are related to his protected status. Only two alleged statements verge on being related to Plaintiff-Appellant's protected status: 1) his immediate supervisor referring to him as Che Guevara, and 2) his second-level supervisor referring to him as an "aggressive Hispanic," the type of individual allegedly needed in the Ft. Worth territory. Even if these statements can be classified as racially offensive, they are not sufficiently severe or pervasive to constitute a hostile work environment.

The two statements related to race and national origin epitomize the type of utterances, epithets, and offhand comments that the we have repeatedly stated were beyond Title VII's purview.[2] In addition, because a reasonable employee would not

perceive the environment as being hostile or abusive, all of the complained-of acts, together, do not amount to discriminatory changes in the terms and conditions of employment. Hence, we agree with the district court that Plaintiff-Appellant fails to establish a genuine issue of material fact on his hostile work environment claim.

2. Constructive Discharge

Vallecillo's constructive discharge claim can be regarded as an aggravated case of hostile work environment claim, he claims that he was twice given an ultimatum to transfer to Ft. Worth, and that an internal grievance that he filed was dismissed

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[2]For instance, in *Shepherd*, Jodie Moore, a co-worker of Plaintiff Debra Jean Shepherd remarked that "[Shepherd's] elbows [were] the same color as [her] nipples." *Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871, 872 (5th Cir. 1999). In addition, Moore commented on the size of Shepherd's thighs while pretending to look under her desk, attempted to look down

and forwarded on for further review. Appellant's claims are not persuasive.

A plaintiff who advances a hostile-environment constructive discharge claim "must show working conditions so intolerable that a reasonable person would have felt compelled to resign." *Pennsylvania State Police v. Suders*, 542 U.S. 129, 124 S. Ct. 2342, 2354 (2004); *see also, Faruki v. Parsons*, 123 F.3d 315, 319 (5th Cir. 1997); *Ward v. Bechtel Corp.*, 102 F.3d 199, 202 (5th Cir. 1997); *Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292, 297 (5th Cir. 1994). The resigning employee bears the burden of proving constructive discharge. *Jurgens v. EEOC*, 903 F.2d 386, 390-391 (5th Cir. 1990). In determining whether an employee has

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Shepherd's clothing, and exclaimed "here's your seat" while patting his lap. *Id.* Although *Shepherd* involved alleged discrimination based on sex, and Vallecillo's claims are based on race and national origin, at best, Vallecillo's allegations are on the same plane as those in Shepherd. Shepherd's allegations were insufficient to succeed on summary judgment in that case, *Id.*, and Vallecillo's are insufficient here. *See also, Hayatavoudi v. Univ. of Louisiana Sys. Bd. Of Tr.*, 240 F.3d 1073 (5th Cir. 2000) (holding that a reference to an Iranian-American employee as being like "the dogs in the desert, howling as the caravan goes by," which was interpreted as a reference to an Arabic proverb was not sufficiently severe or pervasive) (unpublished).

been constructively discharged, courts consider the following factors relevant, singly or in combination: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (6) offers of early retirement that would make the employee worse off, regardless of whether the offer was accepted. *Barrow*, 10 F.3d at 297. The test is an objective, "reasonable employee" test: whether a reasonable person in the plaintiff's shoes would have felt compelled to resign. *Id.*; *See also Haley v. Alliance Compressor LLC*, 391 F.3d 644, 649-50 (5th Cir. 2004).

While proof that the employer imposed the intolerable conditions with the specific intent to force the employee to resign is not required, aggravating factors may be used to support a constructive discharge claim. These factors include hostile working conditions or invidious intent to create or perpetrate the intolerable conditions compelling the resignation. *Jurgens*, 903 F.2d at 390-393. Finally, it is of utmost importance that

"[c]onstructive discharge requires a greater degree of harassment than required by a hostile environment claim." *Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 566 (5th Cir. 2001).

We agree with the district court's reasoning that because Appellant's hostile work environment claim has failed, his constructive discharge claim must also fail. *See id.* Furthermore, conditions were not so intolerable as to compel Vallecillo's resignation. HUD did not demote Vallecillo, and his salary was not reduced. To the extent that any of his job responsibilities were reduced, these reductions did not rise to an actionable degree. *See, e.g., Brown v. Bunge Corp.*, 207 F.3d 776, 782-83 (5th Cir. 2000) (affirming the district court's grant of summary judgment to its employer on constructive discharge, where the resigning employee showed he was demoted and had fewer job responsibilities).

Moreover, the meeting and email notifying and reminding Appellant that he would be transferred to Ft. Worth do not constitute badgering, harassment, or humiliation. Finally, the facts that the meeting notifying Vallecillo of the proposed transfer occurred almost two-and-one-half months before Appellant

resigned and that he was never actually transferred detract from his claim of constructive discharge. Hence, Vallecillo was not constructively discharged.

V. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court as to all claims.

AFFIRMED.

APPENDIX B-OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION DATED AND DECIDED JANUARY 21, 2005

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
SAN ANTONIO DIVISION

PETER VALLECILLO,	§	
Plaintiff,	§	
	§	
v.	§	CAUSE NO.
	§	SA-03-CA
ALPHONSO R. JACKSON,	§	1120-OG
ACTING SECRETARY OF	§	
HOUSING AND URBAN	§	
DEVELOPMENT,	§	
Defendant.	§	

FILED
JAN 27 2005
Clerk U.S. District Court
Western District of Texas
By /s/_____
Clerk

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court is defendant's motion for summary judgment.[1] (Docket no. 19.)

Plaintiff Peter Vallecillo sued his former employer alleging: (1) hostile work environment based on race, national origin, and protected activity; (2) constructive discharge; and (3) that his grade and salary level assignment constituted discrimination based on race and national origin.

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1 Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). All facts and inferences are viewed in the light most favorable to the party opposing summary judgment. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986). The opposing party may not rely on mere allegations or denials, however, but must set

HUD hired plaintiff as a Community Builder Fellow in September 1998. The Community Builder (CB) program was designed to hire a diverse group of professionals in 81 HUD regional offices to provide outreach services to foster community and economic development. Plaintiff was one of 400 Community Builders (CBers) selected into this program out of a pool of over 8,000 applicants. After candidate selections were made, HUD's Human Resources department reviewed each selectee's prior experience pursuant to OPM guidelines and recommended a salary grade level of either GS-13, GS-14, or GS-15.

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forth specific facts establishing that genuine issues exist for trial. See FED. R. CIV. P. 56(e). Only factual disputes "that might affect the outcome of the suit under the governing law will

properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Plaintiff was offered a CB fellowship position at the GS-13 level, and he accepted the offer in writing. Plaintiff contends that Hispanics are underrepresented in the CB program and that male Anglos and Blacks had higher GS ratings than Hispanic males. Plaintiff began complaining of these contentions from virtually his first day on the job. He took his complaints to, among others, his first-level supervisor Cynthia Leon, to HUD Deputy Secretary Saul Ramirez, and to Congressman Charlie Gonzalez. On two occasions in November of 1998, two supervisors in the San Antonio office complained to Leon that plaintiff had behaved inappropriately and had been verbally abusive during meetings with him. In February of 1999, Leon accused plaintiff of unprofessional conduct related to his office hours. In March 1999, plaintiff and other CBers met with Leon to discuss their concerns about her lack of leadership and direction. Later than month plaintiff received his performance appraisal and a memorandum of counseling from Leon. The memorandum of counseling

admonished plaintiff for several incidents of unprofessional conduct, including the verbal confrontations with supervisors, plaintiff's use of the email system, and plaintiff's disrespectful attitude toward Leon. The memorandum of counseling did not result in lost pay or benefits or other economic consequences. Plaintiff resigned his position on October 29, 1999.

Hostile work environment.

To prevail on a hostile work environment claim, the plaintiff must prove that: (1) he belonged to a protected group; (2) he was subjected to unwelcome harassment; (3) the harassment complained of was based on race, national origin, or protected activity; and (4) the harassment affected a term, condition, or privilege of employment. Frank v. Xerox Corp, 347 F.3d 130, 138 (5th Cir. 2003). The plaintiff must subjectively perceive the harassment as sufficiently severe or pervasive, and this subjective perception must be objectively reasonable. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993); Frank, 347 F.3d 138. Whether an environment meets this standard depends on "'all the

circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" Harris, 510 U.S. at 23. "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1988) (internal quotation marks omitted).

Assuming plaintiff has raised a fact issue on the first two elements of his prima facie claim, he has not done so on the third and fourth elements. Plaintiff listed nine separate actions in his deposition that he believes comprised a hostile work environment. (Vallecillo depo. At 152-53.) In addition, in his response, plaintiff lists eight incidents which partially overlap those listed in his deposition. Response at 25-27. Accepting all of these events as true, none are related to his protected status, that is, his race, national origin, or protected activity. The only statements that

come close to being racial slurs are that Ms. Leon referred to him as "Che Guevara" on two occasions, and his second-level supervisor, Betsy Julian, referred to him once as an "aggressive Hispanic." Even if these statements can be classified as racially offensive, they are not sufficiently severe or pervasive to constitute a hostile work environment.

In addition, the primary alleged harasser, Cynthia Leon, is also Hispanic. This undercuts plaintiff's argument that the harassment was based on his race or national origin. See, e.g., Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 1002 (5th Cir. 1996) (DeMoss, J., concurring in part and dissenting in part) ("proof that all of the decision makers were members of the same race as the complaining employee would considerably undermine the probability that race was a factor in the employment decision"), abrogated on other grounds, Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000).

Constructive discharge.

To prove a constructive discharge, a "plaintiff must establish that working conditions were so intolerable that a reasonable employee would feel compelled to resign." Faruki v. Parsons, 123 F.3d 315, 319 (5th Cir. 1997). Constructive discharge requires a greater degree of harassment than that required by a hostile environment claim. Brown v. Kinney Shoe Corp, 237 F.3d 556, 566 (5th Cir. 2001). Thus, because plaintiff's hostile environment claim has failed, his constructive discharge claim must likewise fail.

Salary discrimination based on race.

Plaintiff, hired at the GS-13 level, believes he should have been hired at the GS-14 level or higher and that HUD did not do so because of race or national origin discrimination. As indicated, plaintiff began complaining about his pay grade from virtually his first day on the job. Plaintiff accepted his position on September 12, 1998. He indicates he first became aware of his alleged discriminatory salary grade during his training orientation in Washington which occurred in September shortly after he began

his employment. Plaintiff raised the issue of his salary with Cynthia Leon on September 30, 1998. Response at 2. Plaintiff also raised the issue of his salary in a letter to HUD Deputy Secretary Saul Ramirez in a December 18, 1998 letter. Motion for Summary Judgment, appendix 8. Plaintiff first contacted an EEO Counselor about alleged discrimination on March 22, 1999, some three to six months after he admittedly learned of the alleged discrimination.

Before bringing suit, a federal employee must exhaust his administrative remedies against his employer. Fitzgerald v. Secretary, U.S. Dept. of Veterans Affairs, 121 F.3d 203, 206 (5th Cir. 1997). If a federal employee fails to exhaust his administrative remedies, the district court cannot adjudicate the employee's Title VII claim. Id.; see also Porter v. Adams, 639 F.2d 273, 276 (5th Cir. 1981) (exhaustion is "an absolute prerequisite" to suit under § 2000e-16). A federal employee must initiate contact with a designated agency EEO counselor within 45 days of the effective date of the action. 29 C.F.R. § 1614.105(a).

Thus, any alleged employment actions that occurred prior to the 45-day period preceding plaintiff's first contact with the EEO Counselor are barred, absent a showing of waiver, estoppel, or equitable tolling. Teemac v. Henderson, 298 F.3d 452, 454 (5th Cir. 2002). As plaintiff has not even attempted to show his discriminatory pay claim is timely, it is barred. Even if the claim were properly before the Court, plaintiff has failed to raise a fact issue that his salary grade determination was based on his race or national origin.

Defendant's motion for summary judgment is GRANTED, and plaintiff's claims are DISMISSED in their entirety.

SIGNED this 21 day of January, 2005.

/s/ Orlando L. Garcia
ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE